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No. 92-699

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANNY FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly found no error in comments made by the prosecutor at petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A13) is unpublished, but the judgment is noted at 968 F.2d 1217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of distributing

methamphetamine, 21 U.S.C. 841(a)(1), one count of unlawfully establishing a methamphetamine laboratory, 21 U.S.C. 856, and one count of conspiracy to manufacture and distribute methamphetamine, 21 U.S.C. 846. He was sentenced to 151 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A2-A13.

1. Petitioner owned a trucking depot and a residence in Detroit, Michigan. Petitioner installed plumbing and a ventilation system in a room at the trucking depot, which was managed by Steven Thomson. In October of 1989, Thomas Silvestri, a chemist, set up a laboratory and manufactured methamphetamine there. The laboratory was dismantled in December, and in January and February of 1990 the conspirators moved the equipment to the residence, where Silvestri resumed manufacturing methamphetamine. Pet. App. A3-A4.

Elton Mitchell, an employee of the trucking company who had helped dismantle the laboratory at the depot, began cooperating with the Drug Enforcement Administration (DEA) in January of 1990. With Mitchell's assistance, an undercover DEA agent made three controlled purchases of methamphetamine from Thomson in March of 1990. Thomson and Silvestri were arrested at the depot on March 20, 1990. Papers found at the depot following the arrests connected petitioner to the residence, a search of which revealed the methamphetamine laboratory. Thomson pleaded guilty prior to trial and testified against his co-conspirators. Silvestri was tried with petitioner and

convicted on nine counts relating to the drug conspiracy. Pet. App. A4.

2. On appeal, petitioner claimed that prosecutorial misconduct entitled him to a new trial. He identified four remarks by the prosecutor during closing argument that he considered improper: a comment on the failure of the defense to produce a particular piece of evidence; reference to this country's drug problems; a comment allegedly denigrating petitioner's counsel; and a reference to testimony about a witness's fear of petitioner. The court of appeals held that the prosecutor's remarks did not deprive petitioner of a fair trial. Pet. App. A4-A12.

ARGUMENT

1. Petitioner claims (Pet. 13-18) that the prosecutor violated his Fifth Amendment rights by referring to the ability of the defense to put on certain evidence.

During closing argument, counsel for Silvestri questioned the government's motive for not playing tape recordings of conversations between a DEA agent and the cooperating co-conspirator, Thomson.[1] In his rebuttal argument, the prosecutor noted that the defendants had copies of the tapes and stated that they could have introduced the taped evidence if it had

[1] "If they really wanted to let you know what was going on, [the informant] and [the DEA agent] were both monitored at all times. Why didn't they bring these wires in here? They had a recording of what was going on. If they really wanted to tell you what was going on, why didn't they bring it here?" III Tr. 166-167.

differed from the testimony at trial.[2] Defense counsel objected; the court held a sidebar conference and then gave a curative instruction regarding a criminal defendant's right not to testify or present evidence. Pet. App. A5.

This Court has held that where a prosecutor's reference to a defendant's failure to testify is a fair response to a defense argument, the reference does not violate the privilege against compelled self-incrimination. *United States* v. *Robinson*, 485 U.S. 25, 32 (1988). Here, the prosecutor did not treat the defendants' failure to introduce the tapes as substantive evidence of guilt. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976). Rather, as the court of appeals correctly found, the comment was a fair response to an argument made by defense counsel. Defense counsel opened the door on the issue of the tape recordings; the prosecutor simply responded to the suggestion that the government was suppressing or concealing the tape recordings. See *Darden* v. *Wainwright*, 477 U.S. 168, 182 (1986). A defense argument suggesting that particular evidence must

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[2] "[Defense counsel] says there were tapes, why didn't the Government play the tapes? * * * Yes, there were tapes in this case. I told you that at the beginning, but you had the real witnesses here. Both Defendants have the tapes. Now, they have no obligation whatsoever to present a defense. None. The burden is entirely on the Government. But, if those tapes said anything different from what you heard from the stand, you would have heard them from the Defendants. The tapes are of low quality." III Tr. 190-191. At the sidebar conference following defense objection, the prosecutor indicated that he thought he had said "defense" rather than "defendants." *Id.* at 192.

have been unfavorable to the government because the government failed to introduce it invites a response from the prosecutor that the defense had access to the evidence and could have introduced it if it were exculpatory. See, *e.g.*, *United States* v. *Rouleau*, 894 F.2d 13, 15-16 (1st Cir. 1990); cf. *United States* v. *Burnett*, 890 F.2d 1233, 1242 (D.C. Cir. 1989).

2. Petitioner claims (Pet. 10-12) that his right to a fair trial was compromised by the prosecutor's reference to the nation's drug crisis.

During closing argument, counsel for Silvestri argued that the government's case was manufactured with the connivance of Thomson, who was to receive a reduced sentence for his cooperation, and Mitchell, who was paid for assisting in the the DEA investigation.[3] In his rebuttal, the prosecutor stated that the government would not expend scarce resources prosecuting people on the basis of manufactured evidence, partly because of the magnitude of the

[3] "[Mitchell] was paid $4,100.00 for this case. And $5618.00 for all the cases. And Counsel wants you to believe that if he were not beat up by the other man that was bought, bought four years, bought between 97 months and 60 months, which is roughly over three years, if he were not beat up on January 1st by that drunk, Mr. Thomson who came in that morning, that we wouldn't be here today. I don't believe that and if you believe that, I respectfully submit, I believe, that you would be wrong in believing what the Government is trying to put in front of you." III Tr. 162. "Don't let their bought witnesses fool you. Don't let their bought witnesses get away with what they're doing." *Id.* at 171.

drug problem in this country.[4] Neither defendant objected to the statement. Pet. App. A7.

This Court has held that where a prosecutor's comments do no more than "right the scale" by substantially responding to a defense argument, the comments do not warrant reversal. *United States* v. *Young*, 470 U.S. 1, 12-13 (1985). Here, the prosecutor did not ask the jury to convict the defendants because they were part of the national drug problem. Cf. *Viereck* v. *United States*, 318 U.S. 236, 247-248 & n.3 (1943). Rather, as the court of appeals correctly found, the comment was a fair response to an argument made by defense counsel, who accused the government of buying false testimony; the prosecutor replied that a sufficient number of people traffic in drugs to make it unnecessary for the government to fabricate crimes. A defense argument suggesting that the prosecution has an improper motive invites a response from the prosecutor dispelling that suggestion. See, *e.g.*, *United States* v. *Pungitore*, 910 F.2d 1084, 1120-1127 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991).

In any event, without a timely objection, a court may take notice only of plain errors. Fed. R. Crim. P.

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[4] "Both Defense Counsel want you to believe that this is all a ruse. * * * That this was created out of whole cloth by the Government. We went out and bought this evidence just to get Thomas Silvestri and Danny Fisher. The Government has much better things to do with itself than chase Thomas Silvestri and Danny Fisher. The drug problem in this country is of a magnitude way too large for the Government to waste its time with people that have been sucked into something by two bought witnesses." III Tr. 190.

52(b). Accordingly, even if the prosecutor's statement was inappropriate, "the dispositive issue under the holdings of this Court is not whether the prosecutor's remarks amounted to error, but whether they rose to the level of 'plain error' when he responded to defense counsel." *United States* v. *Young*, 470 U.S. at 14. Plain errors are "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 15 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Prosecutorial comments are not likely to rise to the level of plain error. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The court of appeals correctly concluded that the prosecutor's glancing reference to the war on drugs was not "particularly egregious," *United States* v. *Frady*, 456 U.S. 152, 163 (1982), and thus did not constitute plain error.

3. Petitioner asserts (Pet. 12-13) that the prosecutor improperly "denigrated" the efforts of his lawyer.

In his closing argument, counsel for petitioner argued that the only evidence linking petitioner to the drug conspiracy was Thomson's testimony, and he claimed that Thomson had a motive to lie because of his plea agreement with the government.[5] In his rebuttal, the prosecutor reminded the jurors that "[y]ou are the judges of credibility. What [defense

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[5] "[Thomson], in a sense, has got to perform. He's got to come across with good testimony. He's got to do all he can do and the better he does, the better he will do. He's got a motive; got a big motive. To lie. And we say that's exactly what happened." III Tr. 186.

counsel] thinks doesn't matter." III Tr. 190.[6] No objection was made to the prosecutor's comment. Pet. App. A12.

This Court has recognized that prosecutors "customar[ily]" inform the jury that arguments of counsel are not evidence. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974). The prosecutor did not disparage petitioner's lawyer personally, or question his ability or performance. Nor did the prosecutor imply that his evaluation of the evidence was entitled to more weight than defense counsel's; he merely told the jurors that they were the ones to make the credibility determination. The prosecutor's response to petitioner's counsel's assault on the evidence and the credibility of the witnesses was both appropriate and a correct statement of the law. See *United States* v. *Rivera*, 971 F.2d 876, 883 (2d Cir. 1992). The court of appeals correctly concluded that the prosecutor's comment did not constitute plain error.

4. Petitioner complains (Pet. 18-21) that the prosecutor impugned his character by eliciting testimony that a witness was afraid of petitioner and referring to that testimony during his closing argument.

Thomas Meshinski worked for petitioner and lived in the residence (owned by petitioner) where Silvestri set up a laboratory and manufactured illegal drugs. Meshinski testified that petitioner helped Silvestri move some items into the house and that foul odors

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[6] Later in his summation, the prosecutor said: "What you have to assess is Steven Thomson's credibility. Everything Mr. Thomson told you in this case was corroborated. You saw him on the stand and you were able to assess what he said. You're the judges." III Tr. 196.

came from the upstairs rooms where the laboratory was found. II Tr. 162, 169. During cross examination by defense counsel, Meshinski became visibly upset. See Gov't C.A. Br. 5. On redirect examination, the prosecutor asked him about his nervousness.[7] When Meshinski said that he was afraid of petitioner, the prosecutor asked why. Defense counsel objected and, following an off-the-record sidebar conference, the prosecutor turned to a different line of questioning. In his rebuttal argument, the prosecutor made a brief reference to Meshinski's testimony that he was afraid of petitioner.[8] No objection was made. Pet. App. A8-A9.

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[7] Q: Mr. Meshinski, are you nervous?
A: Yes.
Q: Why?
A: I don't know.
Q: Have you ever testified before?
A: No, not like this.
Q: Are you afraid of anything or anyone in connection with this case?
A: Yes.
Q: Why?
A: I am afraid of not being able to walk out of here.
Q: Why do you have that fear? Are you afraid of a person?
A: Yes.
Q: Who?
A: Danny Fisher [petitioner].
Q: Why?
[Defense objection.]

II Tr. 201.

[8] "What did Mr. Meshinski told [*sic*] you? He was afraid of someone." III Tr. 198. The court reporter noted that the prosecutor was "[i]ndicating the Defendants." *Ibid.*

After defense counsel objected to the line of questioning, the prosecutor discontinued it. As the court of appeals recognized, the record does not reflect a defense request to strike Meshinski's testimony or for a curative instruction. Pet. App. A11.[9] Under the circumstances, the court of appeals correctly determined that Meshinski's testimony did not warrant reversal:

> To the extent that Meshinski's testimony created an inference that [petitioner] was conscious of his own guilt, we note that Meshinski's testimony was cumulative of testimony that [petitioner] attempted to bribe Thomson, demonstrating a similar consciousness. In addition, permitting the jury to hear the testimony did not "strike at the fundamental fairness" of the trial. [Petitioner's] guilt was clear, and more than ample evidence implicated him in the amphetamine conspiracy.

Pet. App. A11.[10] Likewise, the prosecutor's brief mention of Meshinski's testimony in his rebuttal

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[9] This Court should disregard the self-serving affidavit of petitioner's trial counsel, Pet. App. A16, which was not part of the record below. Because petitioner failed to follow the procedures for introducing evidence of unreported proceedings on appeal, see Fed. R. App. P. 10(c), the court of appeals properly denied his motion, made after the court had decided the case, to remand the matter to the district court to supplement the record. This Court should similarly deny petitioner's request (Pet. 28) to send the case back to the district court.

[10] The court of appeals stated that petitioner's counsel failed to object to the testimony. Pet. App. A11. Counsel for petitioner's co-defendant did object, however, and the district

closing argument, to which no objection was made, did not amount to plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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court had prefaced the trial by stating that an objection by one lawyer would apply to both defendants. I Tr. 3. The court of appeals' determination that it was limited to a plain error analysis was nonetheless correct because counsel did not request that the testimony be stricken or ask the court to give a curative instruction. The district court granted the relief requested by terminating the line of questioning; the court did not err in sua sponte striking the testimony or giving a cautionary instruction.